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No. 258

In the Supreme Court of the United States

OCTOBER TERM, 1958

ALLIED STEVEDORING CORPORATION, JOHN WARD, JOHN POTTER AND MICHAEL BOWERS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
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OPINIONS BELOW

The opinions of the district court (A. 19–21; AA. 23–32)[1] are not reported. The opinion of the court of appeals (Pet. 26–35) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1958 (Pet. 1, 25). The petition for a writ of certiorari was filed on August 6, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

[1] A. designates Appellants' Appendix, Vol. I; AA. designates Appellant's Appendix, Vol. II.

QUESTIONS PRESENTED

1. Whether a single juror's perusal of a handbook for petit jurors which he had obtained several years before trial warranted granting a new trial almost two years after conviction, where upon the basis of a full hearing the courts below concluded that petitioners could not have been prejudiced.

2. Whether, nearly two years after conviction, the trial court erred in denying without a hearing a motion for a new trial on the ground of newly discovered evidence based on an affidavit by a brother of petitioners' deceased co-defendant[2] alleging that a third brother had said that he knew two of the jurors.

STATUTE AND RULE INVOLVED

28 U. S. C. 2255:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause

[2] The deceased co-defendant is named as a petitioner in this proceeding although he had died before the proceeding was instituted in the district court.

notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

* * * * * *

Federal Rules of Criminal Procedure, Rule 33:

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

STATEMENT

On July 29, 1953, petitioners were indicted in the United States District Court for the Southern Dis-

trict of New York on charges of income tax evasion. They were convicted on March 23, 1956, and sentenced on April 16, 1956. A motion to vacate their sentences was denied on July 20, 1956 (143 F. Supp. 947), and the convictions were affirmed in February 1957 (241 F. 2d 925). This court denied certiorari (353 U. S. 984). Motions for reduction of sentences were denied by the trial judge as to petitioners Bowers and Ward on July 3, 1957, but granted as to their co-defendant Potter on July 10, 1957, the execution of his sentence being suspended. Potter, who was then sixty-four years old and suffering from cancer, is now deceased.

On January 9, 1958, petitioners moved for a new trial under Rule 33 of the Federal Rules of Criminal Procedure on the ground of newly-discovered evidence, alleging that one of the jurors in the case had read a booklet called "A Handbook for Petit Jurors" which he had obtained from the clerk of the district court. (AA. 4–8.)[*] The district court (Judge Palmieri, who had presided at the trial) granted a hearing, at which the testimony of this juror, John E. McLaughlin, was taken (AA. 8–19, 29–32), and thereafter denied the motion (Pet. 26–27; AA. 23–32).

McLaughlin testified that several years earlier, when he was called for federal jury service for the first time, he had obtained the handbook from the Clerk and had taken it home and read it; that he had reread it when he was selected as a juror for the trial of the instant

[*] This handbook, a copy of which has been lodged with the Clerk of this Court, was published by authorization of the Judicial Conference of Senior Circuit Judges, for the use of petit jurors in the district courts of the United States.

case; that during the jury's deliberations the only use he had made of knowledge gained from the booklet was in connection with the verdict of guilty against defendant John Potter, now deceased; that, after the verdict against Potter had been reached, one of the jurors remarked that in view of his age and health a guilty verdict might be tantamount to a life sentence; that McLaughlin told the jury that the matter of punishment was not the concern of the jury, but of the judge; and that he had made no other use of the handbooks. (AA. 9–14.) Nothwithstanding McLaughlin's statement to the jury, they returned to the courtroom and asked the court whether it was in their power to recommend leniency, whereupon Judge Palmieri gave a supplemental instruction in which he charged, *inter alia* (AA. 31):

> Now while you may make a recommendation of leniency for any or all of the defendants, it is not legally binding upon me. In the event one is made, however, I will give it consideration. But let me stress one thing: no consideration regarding the penalty which may be imposed should, in any way, affect your prior determination as to whether or not any or all of the defendants should be found guilty. In other words, you must be sure that your verdict is reached in accordance with the principles laid down in my charge, independent of any considerations regarding penalties * * *.

There was no showing or allegation that any of the jurors except McLaughlin had ever possessed one of the handbooks. (AA. 15, 19.)

After their first motion for new trial had been denied, petitioners made a second such motion, sup-

ported by an affidavit of Joseph E. Potter, a brother of the deceased defendant, John Potter. Joseph Potter's affidavit stated that he had been advised by a third brother, Charles Potter, that Charles had known two of the jurors for some time prior to the trial of the instant case. The district court denied this motion without a hearing. (AA. 19–21.)

Appeals from the denials of the two motions were consolidated and the court of appeals affirmed.[1] (Pet. 26–35.)

ARGUMENT

1. The contention (Pet. 7–23) that a new trial should have been granted because one of the jurors had read the "Handbook for Petit Jurors" is wholly without substance. In the first place, the matter should have been raised on the *voir dire* examination of the prospective jurors. Not having done so, petitioners are in no position to complain at this stage of the case. *United States* v. *Gordon*, 253 F. 2d 177, 185 (C. A. 7); *United States* v. *Mathison*, (C. A. 7), decided June 19, 1958, petition for a writ of certiorari pending, No. 93 Misc., this Term; cf. *Frazier* v. *United States*, 335 U. S. 497, 512–513. Second, the federal court in the Southern District of New York,

[1] The court of appeals treated the appeals as though they were styled applications for relief under 28 U. S. C. 2255 as well as motions for new trials on the ground of newly discovered evidence under Rule 33 of the Federal Rules of Criminal Procedure. The appeals, like the petition for certiorari, made no mention of new evidence presentable to a jury. In denying bail to the surviving petitioners on May 14, 1958, the court of appeals stated that "the claim of newly discovered evidence is utterly frivolous."

unlike federal courts in many other districts throughout the country at the time in question, did not make a practice of distributing the handbooks to all jurors, but gave them out only on special request. So far as appears here, Juror McLaughlin was the only juror sitting in this case who possessed such a booklet. That alone is sufficient to distinguish the instant situation from that presented in *United States* v. *Gordon*, *supra*, and to render inapplicable the dissenting opinions in *Gordon*, upon which petitioners necessarily rely. (Pet. 16–19, 22, 23.) In the third place, the record here shows affirmatively that Juror McLaughlin made no use of the knowledge he had gained from the handbook except to tell the other jurors, after John Potter had been found guilty and someone had suggested the advisability of recommending leniency because of his age and health, that the punishment was no concern of theirs. That the jury did not rely on this advice is shown by the fact that they returned to the courtroom and put to the trial judge the question of their power to recommend leniency. Finally, even if we were to concede (which we do not) that by some stretch of the imagination John Potter might have been prejudiced by McLaughlin's reading of the handbook, it is clear that the surviving petitioners (the only parties now before the Court) could not have been affected.[*]

[*] We see no occasion, in the circumstances of this case, to defend the use of this handbook. There are enlightening discussions of its merits in the opinion of the court of appeals in the instant case (Pet. 30–33) and in the concurring opinion of Chief Judge Duffy in *United States* v. *Gordon*, 253 F. 2d 177, 185–188 (C. A. 7).

2. Petitioners' second contention (Pet. 23–24) rests solely upon the hearsay affidavit of Joseph Potter, brother of the deceased defendant, John Potter, which alleges that Charles Potter, another brother, told Joseph Potter that Charles Potter had known two of the jurors for some time prior to the trial. There is no allegation that either of the two jurors knew any of the petitioners; that either of the jurors knew Charles Potter; or that, if either of them did know Charles Potter, they knew his relationship to the deceased co-defendant. Even if the truth of the hearsay allegation were admitted, no inference of prejudice to the petitioners could be drawn.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

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